

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

169  
SUPERIOR COURT  
CRIM. No. 2011-10023

COMMONWEALTH

vs.

DWAYNE MOORE

MEMORANDUM AND ORDER ON DEFENDANT'S  
MOTION FOR CHANGE OF VENUE

By motion filed October 2, 2012, defendant Dwayne Moore moves that the Court order a change in venue for the retrial of the above-referenced case, from Suffolk County to either Berkshire County or Franklin County. The defendant asserts that as the result of extensive pretrial publicity attending to the case he is unable to obtain a fair trial in Suffolk County. The Commonwealth opposes the instant motion.

A change of venue may be ordered where "there exists in the community where the prosecution is pending so great a prejudice against the defendant that he may not there obtain a fair and impartial trial." Mass. R. Crim. P. 37 (b)(1); Commonwealth v. Clark, 432 Mass. 1, 6 (2000). A judge has substantial discretion to transfer a case to another county based on pretrial publicity. Commonwealth v. Gaynor, 443 Mass. 245, 259 (2005), although "the mere existence of pre-trial publicity, even if it is extensive, does not constitute a foundation of fact sufficient to require a change of venue." Commonwealth v. Colon-Cruz, 408 Mass. 533, 551 (1990). "A trial judge should exercise his power to change the venue of a jury trial 'with great caution and only after a solid foundation of fact has been first established.'" Id., quoting Commonwealth v. Smith,

357 Mass. 168, 173 (1970).

There is no question but that the instant case has been extensively reported in the media. The incident was widely reported at the outset because of the number of victims, the fact that two men were found naked, and because two victims were a mother and child. The circumstances suggested that the murders were committed in execution-style, as featured in both print and broadcast media. The trial of the defendant and co-defendant Edward Washington occurred in February - March 2012, spanning four weeks and multiple days of jury deliberation. The two Boston daily newspapers, The Boston Globe and Boston Herald, assigned reporters to cover the trial and more than 50 news or feature articles appeared during and immediately after the trial.<sup>1</sup> The Boston Herald dubbed the case, "Mattapan Massacre" and featured the term as a by-line for its daily coverage. Both papers reported the mistrial declaration (and acquittal of Edward Washington) as their headline stories on March 23, 2012; the Herald's front page had a full page photograph of the sister of one victim placing a flower on her grave marker, with the headline, "We just didn't get justice . . . not yet." Articles recounted a march by relatives of several victims to the State House in an attempt to see the governor, citizen interviews expressing outrage at the verdicts, and police concerns about maintaining order in the Mattapan community following the verdicts. Articles also reported on events occurring during jury deliberations and included interviews with jurors who expressed their certainty as to the defendant's guilt.

Additionally, the broadcast media covered the trial from beginning to end, showing film clips as part of the evening news on most of the Boston television stations (WBZ, WCVB,

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<sup>1</sup> The defendant's Motion Regarding Jury Selection, pleading no. 134, includes as attachments, an index and copies of various news stories from the two newspapers.

WHDH, NECN, and Fox News). The media has continued its coverage of the case to the present time, and indications are that the retrial will generate substantial publicity.

In assessing where pretrial publicity has been so pervasive that a change in venue is warranted, courts look to the influence of the media coverage on the trial, the size of the community, the content of the news stories, and the length of time between publicity and the trial. Commonwealth v. Toolan, 460 Mass. 452, 463-464 (2011), quoting Skilling v. United States, 130 S.Ct. 2895, 2915 (2010). As noted, the media focus on the case has been extensive and sensational, and not so distant in time as to diminish in the public eye the notoriety of the crime. Although Suffolk County has an urban population estimated at 730,000<sup>2</sup>, it is geographically small and all parts are exposed to the Boston media market. The tenor of the news stories by and large have not been disparagingly prejudicial to the defendant individually or to any anticipated defense strategy or claim, a significant number of stories have, as a theme, the fact that no one has yet been convicted for such a horrendous group of murders. Likely in the minds of many, justice will not be achieved until the defendant has been held accountable.

I do not find that the pretrial publicity here is such that a change of venue is mandated because of presumptive prejudice, so “utterly corrupt[ing]” a jury venire that the defendant can only get a fair trial through a change in venue. Toolan, *supra* at 463. Rather, I find that the circumstances surrounding the retrial are appropriate for at least a partial change in venue in the exercise of my discretion. Commonwealth v. Gaynor, 443 Mass.245, 259 (2005); Commonwealth v. James, 424 Mass. 770, 775 (1997).

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<sup>2</sup> U.S. Census Bureau, Population Division data, April 2012 release.

The defendant requests that the case be transferred for trial purposes to either Berkshire or Franklin Counties, the two counties most geographically distant from Boston. Neither county is suitable for several reasons. First, the populations of each county is small; Berkshire has an estimated population of 130,000, and Franklin has 71,000. The typical jury venire is relatively small; Berkshire summonses an average of 238 jurors a week for the superior, district and juvenile courts in Pittsfield, and the Greenfield multi-use courthouse summonses fewer than 140 jurors a week.<sup>3</sup> The Berkshire Superior Court has a single session, split between criminal and civil cases which total over 450 active cases. Taking over the courthouse for the retrial of this case, likely to last several weeks to a month, would severely interfere with the administration of justice in that county. Similarly, the Franklin Superior Court, situated in Greenfield, is but a single courtroom in a multi-use courthouse. The Court sits only seven months a year and does not have a scheduled term of court until December, 2012.

Moreover, transferring the cases for trial to either one of these locations would present great hardships to the parties and court personnel. The Commonwealth called 43 witnesses at the first trial, most of whom were Boston-based. They included first responders, crime scene technicians and laboratory analysts, police detectives and officers, and medical examiners and a treating physician. Many civilian witnesses reside in Boston and likely would be challenged in getting to a distant county in order to testify when called. Similarly, the families of the five victims, as well as the defendant's family, have an obvious interest in attending the retrial.

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<sup>3</sup> The figures here are based on data received from the Office of the state Jury Commissioner. The defendant did not file a motion to change venue until October 2, 2012, providing inadequate time for the jury commissioner to increase the size of its jury list to accommodate a case of this magnitude.

Expecting that they would travel up to six hours each day, or incur the cost of lodging, is neither fair nor realistic.

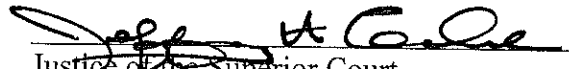
Assessing a variety of resource and practical concerns related to venue, it is appropriate and most feasible to draw from a Worcester County jury venire. Worcester County lies at the center of the state, spanning from Connecticut on its southerly border to New Hampshire on the north. The jury pool is drawn from 54 cities and towns, many likely outside the peak subscription region of the Boston daily papers, and probably less focused on television news coverage of Boston cases or trials. The population of Worcester County is the second largest in Massachusetts, estimated at slightly over 800,000 according to U.S. census projections.<sup>4</sup> On average, 442 prospective jurors are called to the Worcester Trial Court on a weekly basis, providing a sizable pool from which to conduct the necessary voir dire to select 16 jurors. If feasible, the trial will take place in the Suffolk County courthouse with the jury bused in each morning and returned to a central Worcester County location each afternoon. While this may result in a slightly shorter trial day (perhaps 10:00 a.m. to 3:00 p.m.), it will have certain beneficial consequences, most notably in enabling court personnel to insulate jurors from other parts of the courthouse and environs, thereby reducing the potential for a juror being exposed to extraneous influences.

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<sup>4</sup> The largest county in Massachusetts is Middlesex County with a population in excess of 1.5 million. However, many of the communities of Middlesex County are geographically close and well within the reach of the Boston media market.

**ORDER**

Therefore, the defendant's motion is ALLOWED in part. Jury Impanelment shall occur in, and jurors drawn, from Worcester County.

  
Justice of the Superior Court

Dated: October 5, 2012